

LAW OFFICES
HALEY, BADER & POTTS
4350 NORTH FAIRFAX DR., SUITE 900
ARLINGTON, VIRGINIA 22203-1633
TELEPHONE (703) 841-0606
FAX (703) 841-2345

DAVID G. O'NEIL
ADMITTED IN D.C. ONLY

POST OFFICE BOX 19006
WASHINGTON, D.C. 20036-9006
TELEPHONE
(202) 331-0606

February 4, 1994

RECEIVED
FEB - 4 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OUR FILE NO.
0250-120-63

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

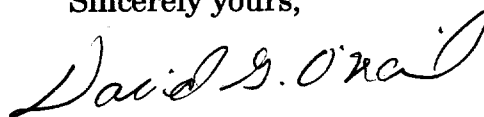
Re: Beverly Hills, Florida
MM Docket No. 92-195

Dear Mr. Caton:

Sarasota-FM, Inc., Gator Broadcasting Corporation, and Heart of Citrus, Inc. hereby transmit an original and four copies of their *Opposition to Application for Review* in the above-captioned proceeding.

Please contact the undersigned directly if there are any questions concerning this matter.

Sincerely yours,



David G. O'Neil

DGO:do
Enclosures (5)

No. of Copies rec'd 07 4
List A B C D E

DOCKET FILE COPY ORIGINAL

ORIGINAL
RECEIVED

FEB - 4 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
Federal Communications Commission

Washington, D.C. 20554

In The Matter Of	)	MM Docket No. 92-195
)	
Amendment of Section 73.202(b)	)	RM-7091
Table of Allotments	)	RM-7146
FM Broadcast Stations	)	RM-8123
(Beverly Hills, Chiefland, Holiday,	)	RM-8124
Micanopy, and Sarasota, Florida))	

TO: The Commission

Sarasota-FM, Inc.

Michael H. Bader, Esq.
Theodore D. Kramer, Esq.
David G. O'Neil, Esq.
HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
(703) 841-0606

ITS ATTORNEYS

**Gator Broadcasting
Corporation**

David D. Oxenford, Jr., Esq.
FISHER, WAYLAND, COOPER & LEADER
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 775-3546

ITS ATTORNEY

Heart of Citrus, Inc.

A. Wray Fitch III, Esq.
GAMMON & GRANGE
8280 Greensboro Drive
7th Floor
McLean, VA 22102-3807
(703) 761-5000

ITS ATTORNEY

February 4, 1994

Summary

The Commission must deny Dickerson Broadcasting, Inc.'s *Application for Review* for failing to establish a basis for reversing the Mass Media Bureau's decision to allot Channel 292C3 to Beverly Hills and modify the license of FM Radio Broadcast Station WXOF accordingly. Dickerson, the licensee of FM Radio Broadcast Station WXOF, Starke, Florida, had actual notice of the Bureau's intent to upgrade the facilities of WXOF on Channel 292C3 as evidenced by Dickerson filing a *Petition for Reconsideration* of the *Report and Order* upgrading WXOF. The Bureau considered and rejected Dickerson's arguments against allotting Channel 292C3 to Beverly Hills, correctly applying the old mileage separation rules of Section 73.213 and concluding that upgrading WXOF would better serve the public interest than increasing WEAG's power.

In proceeding to upgrade WXOF on Channel 292C3, the Bureau complied with and surpassed the Administrative Procedure Act's ("APA") requirements for general notice of the proposed channel substitutions in the above captioned proceeding. The Federal Register summary of the *Notice of Proposed Rule Making* informed the public that the Bureau might allot a Class C3 channel to Beverly Hills, either on Channel 246 or an alternate channel. The Bureau also issued their own Public Notice proposing to allot an alternate Class C3 channel for Beverly Hills. The Bureau correctly concluded that Dickerson had adequate notice of the proposed channel substitutions in this proceeding and that the ultimate channel substitutions granted by the Bureau were a "logical outgrowth" of the original *Notice of Proposed Rule Making* in this proceeding.

Even if the Bureau erred and did not comply with the notice requirements of the APA, the error is harmless error. Dickerson did not have a valid counterproposal for the Bureau's consideration by the deadline for filing counterproposals in this proceeding. Accordingly, the Commission must deny Dickerson's *Application for Review*.

TABLE OF CONTENTS

Background.....	2
I. The Bureau Allotted Channel 292C3 to Beverly Hills in Compliance with the Administrative Procedure Act	7
A. Dickerson Had Actual Notice of the Bureau's Proposal to Allot Channel 292C3 to Beverly Hills	7
B. The Federal Register Publication of the Notice Provided General Notice as Required by the Administrative Procedure Act	9
C. Allotment of Channel 292C3 to Beverly Hills is a Logical Outgrowth of the Notice of Proposed Rule Making	10
D. The Bureau Provided Public Notice of the SFI/Gator Counterproposal	12
II. The Bureau Applied the Appropriate Mileage Separation Requirements in Granting the SFI/Gator Counterproposal	13
III. Dickerson Does Not Have a Proposal Suitable for Commission Consideration	15
IV. Allotting Channel 292C3 to Beverly Hills Does Not Modify the License of WEAG-FM	17
CONCLUSION	18

Before The
Federal Communications Commission
 Washington, D.C. 20554

In The Matter Of	)	MM Docket No. 92-195
)	
Amendment of Section 73.202(b)	)	RM-7091
Table of Allotments	)	RM-7146
FM Broadcast Stations	)	RM-8123
(Beverly Hills, Chiefland, Holiday,	)	RM-8124
Micanopy, and Sarasota, Florida))	

TO: The Commission

Opposition to Application for Review

Sarasota-FM, Inc. ("SFI"), licensee of FM Radio Broadcast Station WSRZ, Sarasota, Florida; Gator Broadcasting Corporation ("Gator"), licensee of FM Radio Broadcast Station WRRX, Micanopy, Florida; and Heart of Citrus, Inc. ("Heart"), licensee of FM Radio Broadcast Station WXOF, Beverly Hills, Florida; pursuant to Section 1.115(d) of the Commission's Rules and by their attorneys, hereby oppose Dickerson Broadcasting, Inc.'s ("Dickerson") *Application for Review*.¹ Dickerson's arguments fail to establish a basis for the Commission to set aside the action of the Mass Media Bureau ("Bureau") to upgrade the facilities of WXOF. Dickerson had actual and general notice of the proposal to allot Channel 292C3 to Beverly Hills, Florida, an allotment which complies with the Commission's mileage separation rules in effect prior to October 2, 1989. The Bureau considered and properly rejected Dickerson's proposal to increase power for its FM Radio Broadcast Station WEAG, Starke, Florida, even though Dickerson's proposal was incomplete and

¹ SFI, Gator, and Heart requested an extension of time to file their opposition until February 4, 1994, which the Commission's staff granted. Thus, this opposition is timely filed.

cannot be considered in this proceeding. In support hereof, the following is shown:

Background

1. Since February, 1988, SFI and Gator have attempted, in two separate rule making proceedings, to upgrade their facilities in Central Florida. For various technical and procedural reasons, the Bureau denied their proposal in MM Docket No. 87-455 in July, 1989. *Perry, Florida*, 4 FCC Rcd 5599 (1989) (Chief, Policy and Rules Division).²

2. On August 30, 1989, SFI and Gator filed a petition for rule making ("SFI/Gator petition"), proposing the substitution of channels for FM Radio Stations in Beverly Hills, Chiefland, Holiday, Micanopy, and Sarasota, Florida. The SFI/Gator rule making petition proposed the allotment of Channel 292 to Beverly Hills and upgrades for the facilities of WSRZ, WRRX, and WLVU³.

3. On September 29, 1989, Heart filed a petition for rule making ("Heart petition") proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills and the modification of facilities of WXOF

² Interesting enough, the *Report and Order* and *Memorandum Opinion and Order* in MM Docket No. 87-455 substituted Channel 295C1 for Channel 292A at Cross City, Florida, and allotted Channel 291A to Live Oaks, Florida, of which Dickerson claims it was aware. See *Dickerson Petition for Reconsideration* at 1-2 & 6. It is curious that Dickerson was aware of the channel substitution for Cross City and allotment to Live Oaks, but claims it was unaware of the SFI/Gator counterproposal discussed in the same *Report and Order* and *Memorandum Opinion and Order*, especially when the Bureau invited SFI/Gator to file a new proposal identical to the one considered in the *Memorandum Opinion and Order*. See *Perry, Florida*, 7 FCC Rcd 2557, 2558 (1992) (Deputy Chief, Policy and Rules Division).

³ The SFI/Gator petition proposed the following channel substitutions:

<u>Community</u>	<u>Present Channel</u>	<u>Proposed Channel</u>	<u>Station</u>
Beverly Hills	246A	292A	WXOF
Chiefland	247A	300C2	WLQH
Holiday	292A	246C2	WLVU
Micanopy	249A	247C2	WRRX
Sarasota	292A	293C2	WSRZ

to specify operation on Channel 246C3. The SFI/Gator and Heart rule making petitions were mutually exclusive because they proposed the substitution of different channels for Beverly Hills, Florida, both of which the Bureau could not grant.

4. On October 2, 1989, the Commission's new mileage separation rules, adopted in MM Docket No. 88-375, went into effect.⁴ In adopting the new mileage separation rules, the Commission increased the mileage separation requirements between Class A Stations and other classes of FM Radio Stations. The Commission grandfathered radio stations and allotments short-spaced as a result of MM Docket No. 88-375. 47 C.F.R. § 73.213(c). Applications and petitions for rule making filed prior to October 2, 1989 were required to comply with the old mileage separation rules. *Mileage Separation Order* at 6382. The Commission also stated it would process rule making petitions filed prior to October 2, 1989 in accordance with the rules and procedures in effect prior to that date. *Id* at 6382.

5. SFI/Gator's and Heart's respective rule making petitions remained pending before the Commission for over three years, until the Bureau issued a *Notice of Proposed Rule Making*, 7 FCC Rcd 5910 (1992) (Chief, Allocations Branch) ("*Notice*"), for the Heart rule making petition. A summary of the *Notice* appeared in the Federal Register on September 15, 1992. 57 Fed. Reg. 42537. The Bureau did not issue a *Notice of*

⁴ *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989) ("*Mileage Separation Order*").

Proposed Rule Making regarding the SFI/Gator rule making petition, which is still pending before the Commission.⁵

6. The Federal Register *Notice* described Heart's rule making petition to allot a Class C3 Channel to Beverly Hills. The Federal Register *Notice* elicited comments and reply comments and directed parties to review Sections 1.415 and 1.420 of the Commission's Rules for proper filing procedures. The Federal Register *Notice* advised interested parties how to obtain a copy of the *Notice* and provided the name of a Commission staff person for further information.

7. On October 30, 1992, the deadline for filing comments and counterproposals, SFI and Gator jointly filed comments ("SFI/Gator counterproposal") in response to the *Notice*. Instead of proposing an upgrade in facilities for WXOF alone as the *Notice* suggested, SFI and Gator proposed upgrades for WXOF, WSRZ, WRRX, and FM Radio Broadcast Station WLVU, Holiday, Florida.⁶ The SFI/Gator counterproposal tracked the 1989 SFI/Gator rule making petition. Heart also filed a counterproposal, proposing the substitution of Channel 246C2 for Channel 246A at Beverly Hills, Florida, and the modification of WXOF's license accordingly. Dickerson did not file anything.

8. On November 20, 1992, the Bureau released a *Public Notice* listing the SFI/Gator and Heart counterproposals. *Report No. 1918*. The

⁵ Although the Bureau dismissed the SFI/Gator rule making petition as moot in granting the SFI/Gator counterproposal, see *Beverly Hills, Florida*, 8 FCC Rcd 2197, 2200 (1993) (Chief, Allocations Branch), Dickerson's *Petition for Reconsideration* and subsequent *Application for Review* have effectively stayed the dismissal.

⁶

<u>Community</u>	<u>Present Channel</u>	<u>Proposed Channel</u>	<u>Station</u>
Beverly Hills	246A	292C3	WXOF
Chiefland	247A	300A	WLQH
Holiday	292A	246C2	WLVU
Micanopy	249A	247C2	WRRX
Sarasota	292A	293C2	WSRZ

Public Notice invited the public to file reply comments on or before December 7, 1992. SFI, Gator, Heart, and Pasco Pinellas Broadcasting Co.⁷ filed reply comments. Dickerson did not file reply comments.

9. The Bureau granted the SFI/Gator counterproposal. *Report and Order*, 8 FCC Rcd 2197 (1993) (Chief, Allocations Branch). The *Report and Order* appeared in the Federal Register on April 2, 1993. 58 Fed. Reg. 17349. The Bureau ruled that the SFI/Gator counterproposal best served the public interest by providing wide area FM radio service to more listeners than the Heart counterproposal. *Id.* at 2198. The Bureau further ruled that because Heart filed its petition for rule making proposing a Class C3 allotment to Beverly Hills prior to October 2, 1989, the old mileage separation rules applied for any Class C3 Channel ultimately allotted to Beverly Hills. *Id.* at 2198 n.6.

10. On April 28, 1993, Dickerson filed its *Petition for Reconsideration* of the Bureau's *Report and Order*.⁸ Dickerson complained that allotment of Channel 292C3 to Beverly Hills frustrates Dickerson's efforts to increase the power of WEAG to six kilowatts because of short-spacing between WEAG and Channel 292C3 under the new mileage separation rules. Dickerson further complained that it did not have notice of the SFI/Gator counterproposal because the Bureau did not publish the counterproposal in the Federal Register. Finally, Dickerson claimed the Bureau should use the new mileage separation rules in considering the SFI/Gator counterproposal, because SFI/Gator

⁷ Pasco Pinellas Publishing Co. is the predecessor licensee of WLUV. The current licensee is Times Publishing Company.

⁸ Dickerson is the licensee of FM Radio Station WEAG, Starke, Florida, a grandfathered three kilowatt Class A Station.

filed the counterproposal three years after the new mileage separation rules went into effect.

11. On December 8, 1993, the Bureau issued its *Memorandum Opinion and Order*, DA 93-1364 (Chief, Policy and Rules Division) ("MO&O"), denying Dickerson's *Petition for Reconsideration*. With regard to the alleged short-spacing between WXOF and WEAG, the Bureau ruled that Heart's rule making petition was entitled to processing pursuant to the old mileage separation rules and the Commission's procedures for processing rule making petitions, including the selection of alternate channels for Beverly Hills because Heart filed its rule making petition prior to October 2, 1989. *Id.* at 2. The Bureau concluded that the SFI/Gator counterproposal, proposing the substitution of Channel 292C3 for Beverly Hills, satisfied the old mileage separation requirements. *Id.*

12. The Bureau rejected Dickerson's claim of lack of notice, noting that Section 3(c) of the Appendix to the *Notice* expressly alerted all potentially interested parties that the filing of a counterproposal may lead the Bureau to allot a different channel than was requested for any of the communities involved. *Id.* The Bureau held that it is not required under the Administrative Procedure Act to issue a separate notice for every channel under consideration. *Id.* The allotment of an alternate channel for Beverly Hills, the Bureau concluded, satisfied the "logical outgrowth" test because the *Notice* elicited counterproposals and announced the possibility of allotting an alternate channel to Beverly Hills. *Id.* The Bureau also compared Dickerson's proposal to the SFI/Gator counterproposal and concluded that upgrading WXOF would

provide improved service to more listeners than Dickerson's proposal.
MO&O at 1 n.3.

13. On January 7, 1994, Dickerson filed an *Application for Review* of the Bureau's *Memorandum Opinion and Order*. Dickerson's *Application for Review* reiterates the arguments Dickerson raised in its *Petition for Reconsideration*. For the reasons discussed below, the Commission must deny Dickerson's *Application for Review*.

I. The Bureau Allotted Channel 292C3 to Beverly Hills in Compliance with the Administrative Procedure Act

A. Dickerson Had Actual Notice of the Bureau's Proposal to Allot Channel 292C3 to Beverly Hills

14. Section 553(b) of the Administrative Procedure Act ("APA") waives the general notice requirements for a proposed rule making when the person has actual notice of the proposed rule making. 5 U.S.C. § 553(b) (1977); see *Owensboro On the Air, Inc. v. Federal Communications Commission*, 262 F.2d 702, 707 (D.C. Cir. 1959) (presence of actual notice negates requirement of general notice).

15. Dickerson had actual notice of the *Report and Order* allotting Channel 292C3 to Beverly Hills and an opportunity to make its views known to the Commission, as evidenced by its filing of a *Petition for Reconsideration* of the *Report and Order*. Dickerson claims it filed its *Petition* because a local broadcaster informed Dickerson of the proposed allotment of Channel 292C3 to Beverly Hills. *Dickerson Petition for Reconsideration* at 3-4. Dickerson raised its objections to the proposed allotment (lack of notice, short-spacing, and proposal to increase the power of WEAG). The Bureau considered Dickerson's arguments and issued a *Memorandum Opinion and Order*

addressing Dickerson's objections. Consequently, while SFI/Gator do not concede that the Bureau erred in failing to give general notice of the SFI/Gator counterproposal at an earlier stage in this proceeding, if there was error, it did not prejudice Dickerson because it had the opportunity to seek reconsideration. *Owensboro*, 262 F.2d at 707.

16. In *Owensboro*, the Commission proposed changes in the Television Table of Allotments for various communities in Indiana, including the allotment of UHF channels to certain communities. *Id.* at 704-05. Despite actual notice of a counterproposal to delete a VHF channel from Hatfield, Indiana, applicants for that channel failed to timely file reply comments to the counterproposal or petition for reconsideration of the Commission's decision to delete the VHF channel. Instead, the applicants argued that the notice of proposed rule making published in the Federal Register did not provide proper notice of the proposal to delete the VHF channel for Hatfield and, therefore, violated the notice provisions for rule making proceedings as mandated by Section 553(b) of the APA. *Id.* at 706.

17. The Court held that the Commission had complied with the notice provisions of Section 553(b) because the applicants had actual notice of the proposed rule making and the subjects and issues involved. Even if the applicants were correct and there was some substance to their claim of lack of earlier notice of the full import of the contemplated rule making, the Court continued, the parties had actual notice of the proposal after the Commission released its *Report and Order*. *Id.* at 707. The applicants could then have sought reconsideration of the *Report and Order*. *Id.*

18. In the instant proceeding, Dickerson concedes that it had actual notice of the *Report and Order* allotting Channel 292C3 to Beverly Hills. Dickerson filed its petition for reconsideration, which the Bureau considered

and rejected. Like the applicants in *Owensboro*, Dickerson's actual notice overrides any prior deficiency there might have been with prior general notice. See *Medford and Grants Pass, Oregon*, 45 RR 2d 359, 362 (1979) (Chief, Broadcast Bureau) (petition for reconsideration provides opportunity for consideration of arguments against allotment).⁹

**B. The Federal Register Publication of the Notice
Provided General Notice as Required by the APA**

19. As shown above, it is clear that Dickerson had actual notice of the proposal to allot Channel 292C3 to Beverly Hills and acted on that notice by filing a petition for reconsideration. Moreover, Dickerson received general notice as required by the APA. Section 553 of the APA only requires that general notice of an agency's proposed rule making be published in the Federal Register. 5 U.S.C. § 553(b). A notice satisfies the APA if it includes either the terms or substance of the proposed rule or a description of the subject and issues involved. 5 U.S.C. § 553(b)(3); *Owensboro*, 262 F.2d at 708.

20. Publication of the *Notice* in the Federal Register proposing the allotment of a Class C3 Channel to Beverly Hills satisfies the notice provisions of Section 553 by providing a description of the subject and issues involved, namely, a change in class of station for Beverly Hills. Moreover, the Federal Register publication elicited comments from the public and advised the public to review Sections 1.415 and 1.420 of its Rules before filing comments. Section

⁹ Dickerson has a history of filing untimely pleadings in rule making proceedings, as evidenced by its late filings in this proceeding and the *Bronson and Cross City, Florida*, proceeding, MM Docket No. 92-200. Dickerson failed timely to file its *Reply to Opposition to Petition for Reconsideration* in this proceeding and filed an objection in the *Bronson and Cross City* proceeding one year after the deadline for filing comments. See *Motion to Strike or Alternatively Opposition to Petition to Dismiss or Return* filed by Women in Florida Broadcasting on January 14, 1994.

1.415 outlines the procedure for filing comments and reply comments in a rule making proceeding. Section 1.420 authorizes interested parties to file counterproposals to a rule making petition. Incorporation of these two criteria by reference constitutes sufficient notice that the Bureau would consider counterproposals to the Heart petition. *See Owensboro*, 262 F.2d at 705 & 708. The Federal Register publication served notice on the public that the Bureau was considering the allotment of a Class C3 Channel to Beverly Hills and that it would consider counterproposals to the *Notice*.

C. Allotment of Channel 292C3 to Beverly Hills Is A Logical Outgrowth of the Notice of Proposed Rule Making

21. A final rule need not be an exact replica of the rule proposed in the Notice provided that the rule is a logical outgrowth of the rule proposed. *National Black Media Coalition v. Federal Communications Commission*, 791 F.2d 1016, 1022 (D.C. Cir. 1986); *Weyerhaeuser Company v. Environmental Protection Agency*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); *Pinewood, South Carolina*, 5 FCC Rcd 7609, 7610 (1990). The test for determining whether a rule is a logical outgrowth is whether the agency's notice would fairly apprise interested persons of the subjects and issues of the rule making. *NBMC*, 791 F.2d at 1022 (quoting *Small Refinery Lead Phasedown Task Force v. Environmental Protection Agency*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

22. As discussed above, the text of the *Notice* published in the Federal Register placed the public on notice that the Bureau might allot a Class C3 Channel to Beverly Hills different than that contained in the *Notice*. Consequently, the Bureau's decision to allot an alternate channel to Beverly Hills is a logical outgrowth of the *Notice*. In granting the SFI/Gator

counterproposal, the Bureau merely did that which it stated it would do in the *Notice*.

23. The Commission has held that allotment of an alternate channel in a rule making proceeding complies with the APA's notice requirements. *Pinewood*, 5 FCC Rcd at 7610; *Pensacola*, 2 FCC Rcd at 1291; *Medford and Grants Pass*, 45 RR 2d at 362. In *Pinewood*, the Commission rejected identical APA arguments raised by a party who filed an untimely counterproposal in response to a notice of proposed rule making. *Pinewood*, 5 FCC Rcd at 7610. In denying arguments that the notice did not comply with the publication requirements of the APA, the Commission concluded that because a notice of proposed rule making in a channel allotment proceeding specifically elicits counterproposals and alerts all interested parties that alternate channels may be substituted for either the original proposal or the counterproposal, the counterproposal is within the scope of the notice. *Id.* at 7610. Consequently, parties contemplating the filing of a counterproposal that may conflict with an alternate channel for the original community must do so by the comment date in order to have their counterproposal considered as part of that proceeding. *Id.*

24. The federal courts and the Commission have held that section 553 does not require an agency to publish in advance every precise proposal which it ultimately may adopt as a rule or publish separate notices for every channel under consideration in a rule making proceeding. *Owensboro*, 262 F.2d at 708; *Spartan Broadcasting Company v. Federal Communications Commission*, 619 F.2d 314, 321 (4th Cir. 1980); *Pinewood*, 5 FCC Rcd at 7610; *Pensacola*, 2 FCC Rcd at 1291; *Medford and Grants Pass*, 45 RR 2d at 362. In *Spartan Broadcasting*, the Commission granted a petition for reconsideration of its television blackout rules, reversing its original decision and shifting the

burden of proof for waivers of the blackout rules. On appeal, the Court of Appeals rejected arguments that the Commission had to comply with Section 553 before granting the petition for reconsideration. The Court ruled that a notice for proposed rule making need not specify every precise proposal which the agency may adopt as a rule. *Id.* at 321. Moreover, the Court held that an agency may change its mind on reconsideration without public notice. *Id.* at 322.

25. The Commission's adoption of a counterproposal to allot a different channel to Beverly Hills than originally proposed was a logical outgrowth of the original proposal and did not require a separate notice to be published in the Federal Register.

D. The Bureau Provided Public Notice of the SFI/Gator Counterproposal

26. The Bureau went beyond the general notice requirement of Section 553 of the APA and issued its own *Public Notice* listing the SFI/Gator and Heart counterproposals. The *Public Notice* described with specificity the proposed channel substitutions contained in the SFI/Gator counterproposal. and elicited further comments from the public regarding the SFI/Gator counterproposal. Once again Dickerson did nothing.

27. Dickerson's attack of the Bureau's efforts to inform the public about the SFI/Gator counterproposal by claiming the *Public Notice* is invalid unless published in the Federal Register denigrates the Bureau's efforts to inform the public of the SFI/Gator proposal. As discussed above, the Bureau satisfied the APA's notice requirements by publishing a summary of the notice in the

Federal Register. The *Public Notice* provided an additional opportunity for the public to comment on counterproposals in this proceeding.

28. Recognizing the weakness of its argument, Dickerson attacks the adequacy of the *Public Notice* for failing to alert Dickerson *personally* that the Bureau intended to use the old mileage separation rules in considering the SFI/Gator counterproposal. *Dickerson Application for Review* at 8-9. Adoption of such a standard of notice would make rule making proceedings unworkable. Each time an agency issued a notice of proposed rule making, not only would the agency have to determine each party potentially affected by the notice, but the agency would have to advise the party how the notice would affect it. The APA does not require such specificity.

II. The Bureau Applied the Appropriate Mileage Separation Requirements in Granting the SFI/Gator Counterproposal

29. In revising the mileage separation requirements, the Commission specifically stated that "[a]pplications and petitions filed prior to October 2, 1989 must comply with, and will be processed in accordance with, the current rules." *Mileage Separation Order*, 4 FCC Rcd 6375, 6382 (1989). The Bureau correctly interpreted this language as permitting counterproposals filed in response to a petition for rule making prior to October 2, 1989 to avail themselves of the mileage separation rules in effect prior to October 2, 1989.¹⁰

30. A plain reading of the quoted language in the *Mileage Separation Order* indicates that in processing a petition for rule making

¹⁰ For the sake of clarity and brevity, the term "old mileage separation rules" applies to the Commission's mileage separation rules and procedures in effect for FM Radio Stations prior to October 2, 1989. The term "new mileage separation rules" applies to the mileage separation rules for FM Radio Stations in effect from October 2, 1989 to the present.

filed before October 2, 1989, the Commission must apply the old mileage separation rules and rule making procedures. Processing a petition for rule making under the Commission's Rules includes considering counterproposals. See Sections 1.401 *Et seq.* Because processing a rule making petition filed prior to October 2, 1989 may require consideration of counterproposals filed after October 2, 1989, common sense and basic fairness dictates that the Bureau process a counterproposal under the same mileage separation rules as the original rule making petition.

31. In substituting Channel 292C3 for Beverly Hills, Florida, the Bureau correctly concluded that because Heart filed its rule making petition under the old mileage separation rules, the Bureau must use the old mileage separation rules in processing Heart's rule making petition and counterproposals filed in response thereto, regardless of when the Bureau actually undertook processing of the rule making petition.

32. Dickerson agrees with the Bureau's analysis, provided that the allotment selected serves Dickerson's interest. In its *Petition for Reconsideration*, Dickerson states that the old mileage separation rules "... should apply only to the 246C2 or 246C3 upgrades as advanced by Heart of Citrus." *Dickerson Petition for Reconsideration* at 4 & 9. But Heart first proposed substituting Channel 246C2 at the same time SFI/Gator filed its counterproposal. It is inconsistent for Dickerson to suggest that Heart's counterproposal may be processed under the old mileage separation rules while the SFI/Gator counterproposal, filed on the same date, must be processed under the new mileage separation rules. By its own admission, therefore, Dickerson acknowledges that counterproposals filed in response to a petition for rule making filed prior

to October 2, 1989, are entitled to processing under the old mileage separation rules.

III. Dickerson Does Not Have A Proposal Suitable for Commission Consideration

33. Remanding this proceeding for further consideration of Dickerson's proposal is unnecessary because Dickerson does not have a valid proposal for the Bureau's consideration. Dickerson's *Petition for Reconsideration* and *Application for Review*, of course, are premised upon the harm it will suffer if the Commission allots Channel 292C3 to Beverly Hills; namely, that Dickerson may be unable to increase power to six kilowatts. Dickerson currently does not have and never has had a valid proposal capable of consideration by the Commission.

34. At the outset, it must be pointed out that Dickerson does not seek consideration of a counterproposal involving the allotment of a different channel, community, or class of station. Instead, Dickerson wishes to increase the power of its station from three to six kilowatts by agreeing to accept interference from other stations pursuant to Section 73.213(c) of the Commission's Rules.¹¹ In order for the Bureau to consider Dickerson's proposal, Dickerson's proposal must be in compliance with the Commission's processing guidelines.

35. The Commission requires applicants increasing their power from three to six kilowatts pursuant to Section 73.213(c)(2) to include an exhibit demonstrating the consent of each licensee for whom consent is

¹¹ Dickerson acknowledges that at a minimum it needs permission from FM Radio Broadcast Station WCJX, Five Points, Florida; FM Radio Broadcast Station WKBX, Kingsland, Georgia; and the successful applicant for a new FM Radio Broadcast Station at Ponte Vedra Beach, Florida. *Dickerson Petition for Reconsideration* at 3.

necessary because of short-spacing under the new mileage separation rules. 47 C.F.R. § 73.213(c)(2). A simple declaration on the part of an applicant that consent has been obtained is inadequate and unacceptable. *Amendment of Part 73 of the Rules to Provide For An Additional FM Station Class (Class C3) And to Increase the Maximum Transmitting Power For Class A FM Stations*, 6 FCC Rcd 3417, 3419 (1991). As a general matter, the Commission will grant an application filed pursuant to Section 73.213(c)(2) if it contains either a letter indicating specific consent, or an agreement between the licensees seeking a mutual power increase. *Id.*

36. By its own admission, Dickerson does not have written consent with each of the affected parties necessary for Dickerson to increase power to six kilowatts. *Petition for Reconsideration* at 3. When SFI, Gator, and Heart brought this deficiency to the Commission's attention in its *Opposition* to Dickerson's *Petition for Reconsideration*, Dickerson still failed to produce evidence of written consent from each affected party.

37. Absent written consent from each party, Dickerson does not have a valid proposal for Commission consideration, thereby making any remand to the Bureau for further consideration of Dickerson's proposal meaningless. In other words, it would be a meaningless exercise for the Commission to consider the alleged benefits of Dickerson's proposed power increase to the channel allotments made in the *Report and Order* because Dickerson's proposal cannot be implemented absent written consent of the stations to which it would be short-spaced.

38. Proposals in a rule making proceeding must be complete at the time they are filed. But Dickerson has never had a complete

proposal for Commission consideration. Dickerson's entire *Application for Review* is a request for consideration of a proposal that does not exist and that the Commission can not grant. The Commission cannot countenance such a request and must deny Dickerson's *Application for Review*.¹²

39. Contrary to Dickerson's assertion, the Bureau did compare the areas and populations served by upgrading WXOF to increasing power for WEAG-FM to six kilowatts. *Report and Order* at 1 n.3.¹³ Remanding this proceeding to the Bureau for further consideration is unnecessary and would delay improved service by upgrading WSRZ, WRRX, WXOF, and WLVU.

IV. Allotting Channel 292C3 to Beverly Hills Does Not Modify the License of WEAG-FM

40. The allotment of Channel 292C3 to Beverly Hills does not modify Dickerson's license for WEAG in violation of the Communications Act of 1934. The *Mileage Separation Order* specifically stated that petitions for rule making filed pursuant to the mileage separation rules in effect as of October 2, 1989 would be processed under the old mileage separation rules. As a result, it is conceivable that the Heart petition for rule making and related counterproposals would have the effect of grandfathering WEAG at three

¹² Equally unavailing is Dickerson's argument that allotting Channel 292C3 to Beverly Hills will prevent Dickerson from increasing its power in the future. Just as a petition for rule making filed after the deadline for counterproposals has passed will not be considered, so Dickerson's future proposal of mutual upgrades for four stations must be denied. See *Pensacola*, 2 FCC Rcd at 1291 (Commission's Rules do not permit filing of counterproposal after date for filing comments).

¹³ In fact, the Bureau noted that upgrading WXOF would provide additional service to almost four times as many listeners as increasing power for WEAG to six kilowatts. See *Report and Order* at 1 n.3 (additional service for 99,884 persons for WXOF versus 28,554 persons for WEAG).

kilowatts. Such grandfathering, however, is not a modification of WEAG's license.

41. As of October 2, 1989, WEAG was a grandfathered three kilowatt Class A FM Radio Broadcast Station with regard to at least three other stations and the separate rule making petitions filed by SFI/Gator and Heart. Because the SFI/Gator counterproposal does not increase the short-spacing to WEAG, but protects WEAG as a grandfathered three kilowatt station, no modification of its license has occurred and written notification is not required.

Conclusion

Dickerson provides no basis for the Commission to overturn the Bureau's decision to allot Channel 292C3 to Beverly Hills and modify the license of WXOF accordingly. The Bureau complied with the provisions of the APA and provided general notice of its proposal to allot Channel 292C3 to Beverly Hills. Dickerson had actual notice of the Bureau's proposal and an opportunity to participate in the proceeding by filing a *Petition for Reconsideration*. The allotment of Channel 292C3 to Beverly Hills is a "logical outgrowth" of the *Notice of Proposed Rule Making* in this proceeding.

The Bureau correctly processed Heart's petition under the old mileage separation rules and allotted Channel 292C3 to Beverly Hills as an alternate channel. The Bureau also correctly rejected Dickerson's unacceptable proposal to increase power, concluding that upgrading WXOF on Channel 292C3 would provide wide area service to more listeners than increasing the power of WEAG.

WHEREFORE for the foregoing reasons, Sarasota-FM, Inc., Gator Broadcasting Corporation, and Heart of Citrus, Inc. request that the Commission deny Dickerson Broadcasting, Inc.'s *Application for Review*.

Respectfully submitted,

Sarasota-FM, Inc.



Michael H. Bader, Esq.
Theodore D. Kramer, Esq.
David G. O'Neil, Esq.

HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
(703) 841-0606

ITS ATTORNEYS

Gator Broadcasting Corporation



David D. Oxenford, Jr., Esq.

FISHER, WAYLAND, COOPER
& LEADER
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 775-3546

ITS ATTORNEY

Heart of Citrus, Inc.

A. Wray Fitch / AGO /
A. Wray Fitch III, Esq.

ITS ATTORNEY

GAMMON & GRANGE
8280 Greensboro Drive
7th Floor
McLean, VA 22102-3807
(703) 761-5000

February 4, 1994

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

*Michael C. Ruger, Chief
Allocations Branch, Policy & Rules Division
Federal Communications Commission
2025 M Street, N.W.
Room 8318
Washington, D.C. 20554

*Robert Hayne
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8337
Washington, D.C. 20554

John M. Spencer, Esq.
Leibowitz & Spencer
One S.E. Third Avenue
Suite 1450
Miami, FL 33131
Counsel for Highlands Media Company, Inc.

Harry F. Cole, Esq.
Bechtel & Cole
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
Counsel for Dickerson Broadcasting, Inc.

Peter Guttman, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
Counsel for Radio Station WLQH